THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on :24.07.2007

WP(C) No.17115-16/2004

BHAGEERATHA ENGINEERING LIMITED ...Petitioner

- versus -

THE NATIONAL HIGHWAYS AUTHORITY OF INDIA ...Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Pratap Venugopal with Ms Surekha Raman.
For the Respondent : Mr Sandeep Sethi, Sr Advocate with Mr K.K. Sharma and Mr T.S. Sidhu.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in Digest ?

BADAR DURREZ AHMED, J (ORAL)

1. The petition is directed against the order dated 05.07.2004 whereby the petitioner has been informed that the petitioner would be considered as a non-performing contractor until his performance shows improvement and meets the performance bench mark during subsequent periodic review of ongoing contract packages of NHAI (National Highways Authority of India). This order is impugned primarily on two grounds. The first ground being that the petitioner has been virtually blacklisted for future contracts of the NHAI based on the allegations of non-performance. The very same allegations are the

subject matter of arbitrations which are pending between the parties. It is the petitioner's case that until the award is made in the arbitration proceedings, it cannot be determined as to who was in default. Whether it was the petitioner or it was the respondent (NHAI)? The second ground urged on behalf of the petitioner was that the impugned order dated 05.07.2004 does not contain any reasons and that by itself makes it bad. The learned counsel for the petitioner placed reliance on a decision of this court in the case of ***SPS Engineering Ltd v Indian Oil Corporation Ltd : 2004(2) CTLJ 57 (Delhi)***. This was confirmed in appeal by a Division Bench in ***Indian Oil Corporation v SPS Engineering Ltd : 2006 IV AD (Delhi) 115***

3. I have heard the counsel for the parties and I find that the decisions cited by the learned counsel for the petitioner entirely cover the issues at hand. The first issue with regard to the virtual blacklisting of the petitioner while an arbitration is pending, was dealt with in ***SPS Engineering*** (*supra*) in the following terms:

> "9. The other aspect that is of material importance is that the entire basis for placing the petitioner in the "Holiday List" is founded upon the allegations *qua* the performance or non-performance with regard to the contracts which were awarded to the petitioner. Therefore, it is not proper or correct on the part of IOCL even to suggest that placement in the "Holiday List" is entirely a non-contractual matter unrelated with the contracts awarded to the petitioner. I fail to see how the very allegations, on the basis of which the petitioner has been placed on the "Holiday List", will not figure in the deliberations before the arbitrator, who would be considering

> the disputes between the parties in their entirety as directed by a learned Single Judge of this Court in his order dated 17.03.2003. Furthermore, the Committee that was constituted comprised entirely of officers of IOCL. In these circumstances, it would have been proper and appropriate for IOCL to have held its hands and waited for an adjudication by the arbitrator on the entire question of commission of breaches, etc., including the termination of the contracts. The determination by the arbitrator would have settled all these issues. As pointed out above, if the arbitrator held against the petitioner, and found it to be in default, then IOCL would be entitled to place the petitioner in the "Holiday List". In such an eventuality, IOCL could not be faulted. I am in agreement with the contention of the learned counsel for the petitioner that the subject matter of arbitration and the question of placement in the Holiday List are intertwined and cannot be put into separate compartments. The records of the case itself reveal that the placement of the petitioner in the holiday List is not on account of reasons outside the contractual obligations of the parties."

4. This facet was confirmed by the Division Bench in ***Indian Oil Corporation*** (*supra*) as under :

> "16. The learned Single Judge in the impugned judgment held that when the entire matter was pending before the Arbitrator there was no need to have proceeded with the issue of placing the petitioner on the holiday list with the undue haste. We agree with this reasoning. When the matter was subject matter of arbitration, the respondent should have awaited the decision of the Arbitrator before taking such a decision in a hurry."

5. As regards the second issue of hearing and the necessity of reasons being given, in ***SPS Engineering*** (*supra*), this court observed as under:-

> "7. Therefore, while it may be argued that a personal hearing is not at all necessary and that if the petitioner has been given an opportunity to reply to the allegations against it, the principle of the *audi alteram*

partem has been fairly complied with, still, one must examine the question of opportunity of hearing in the perspective of the facts of each case. In ***Shrikrishnadas Tikara v. State Govt. of M.P.: (1977) 2 SCC 741*** (at page 745), the Supreme Court observed:-

> "It is well-established that the principles of natural justice cannot be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. Has there been any unfair deal by the authority? Has the party affected been hit below the belt? Has he had a just opportunity to state his plea?.."

"8. Therefore, the issue really is as to whether the denial of opportunity of personal hearing entails that the petitioner has been dealt with unfairly. Here, it is seen that the very allegations which were being made the subject matter of the show cause notices have merely been rephrased to read as conclusions of the said Committee. I have examined the report of the Committee dated 09.04.2003 and it does strike me as if the Committee merely converted the allegations into conclusions and made no serious attempt at discussing or analysing the replies given by the petitioner (SPSEL). The report does not reveal tangible reasons from which it could be discerned that there was a proper application of mind on the replies given by the petitioner. "*Reasons are the link between the order and the mind of its maker*"[*see:* ***M. J. Sivani v. State of Karnataka: (1995) 6 SCC 289*** (para 32)]. And, this link is missing. Perhaps, if the petitioner had been given a personal hearing, there might have been a proper discussion of the replies given by the petitioner. Perhaps the petitioner's replies may have been accepted and perhaps, not. All that is in the realm of what might have happened. What has, in fact happened is that the petitioner was not personally heard and its written replies have not been adequately dealt with. It does appear to me that the petitioner has been dealt with

unfairly. It must be made clear that I am not examining the question on merits but only whether principles of natural justice have been complied with. I dare say, they have not. It is an altogether different issue that even if the opportunity of personal hearing had been given, the respondents might have come to the same conclusion."

6. The Division Bench has confirmed these views as would be apparent from the following observations contained therein :-

"20. All that has been said in the order dated 10.4.2003 is that after considering the allegations in the show-cause notice and the petitioner's reply it has been decided to place the petitioner on holiday list and debar him from contracts with the appellant for three years."

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"21. It is well settled that natural justice requires reasons to be given vide **S.N. Mukherjee Vs Union of India**, AIR 1990 SC 1984; **Union of India Vs M.L. Capoor and ors**. AIR 1974 SC 87 and; **Veekay Connectors (P) Ltd Vs National Small Industries Corpn. Ltd**; AIR 2005 All 57."

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"24. However, in view of the fact that the order impugned in the writ petition does not disclose any reason in our opinion it is bad in law."

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"32. It is well settled that the impugned order cannot be supplemented by additional material either in the form of an affidavit or otherwise vide Mohinder Singh v Chief Election Commissioner, AIR 1978 SC 851; State Govt. Houseless Harijan Employees Association v. State of Karnataka, (2001) 1 SCC 610 (Para 49): (AIR 2001 SC 437, Para 48); Pavanendra Naraian Verma v. SGPGI of Medical Science, (2002) 1 SCC 520 : (AIR

> 2002 SC 23) (Para 34): Union of India v. GTC Industries (2003) 5 SCC 106 (Para 13): (AIR 2003 SC 1383), etc. In our opinion, reasons must be contained in the order under challenge, and mere existence of reasons in the show-cause notice, or any material referred to in the show-cause notice, is not sufficient. In our opinion, the authority concerned must, at least in brief, deal in the impugned order with the explanation given in the reply to the show-cause notice. This in our opinion is even more necessary where a personal hearing is not being given. The authority concerned must discuss the explanation given in the reply, and give its reasons for holding that the explanation is not satisfactory. In the present case all that has not been done."

7. Insofar as the first issue is concerned, that is, the pendency of the arbitration proceedings, Mr Sethi, the learned senior counsel appearing on behalf of the NHAI, submitted that the entire controversy does not form the subject matter of the arbitration proceedings. However, the learned counsel for the petitioner submits that the contract referred to in the show cause notice is entirely the subject matter of the arbitration proceedings. Be that as it may, on the second issue of no reasons having been given in the impugned order, the same is liable to be set aside in view of the discussion above.

8. Accordingly, the impugned order dated 05.07.2004 is set aside. It shall be open to the petitioner to file an additional reply to the show cause notice which is already on record. The said reply be filed within two weeks. The respondent shall pass a speaking order giving reasons after due

consideration of the reply submitted by the petitioner. The petitioner shall be at liberty to take recourse to any remedy that may be available to him in case the order is against him. No costs.

BADAR DURREZ AHMED
(JUDGE)

July 24, 2007
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